Message

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**Sent:** 6/2/2020 5:02:32 PM
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**Subject:** Daily News Clips June 2, 2020 (morning edition)

# Daily News Clips June 2, 2020 (morning edition)



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## Wheeler: EPA Positioned to Reopen Three More Regional Offices

https://news.bloomberglaw.com/environment-and-energy/wheeler-epa-positioned-to-reopen-three-more-regional-offices

By Stephen Lee

The EPA is nudging its regional offices in Boston, Dallas, and Denver closer to reopening, agency chief Andrew Wheeler said in an internal email on Monday.

The three Environmental Protection Agency offices will be closed for seven days to assure that any viruses there are rendered inactive, Wheeler said. Several smaller facilities, not identified in the email, will also be included.

While the seven-day closure starts June 1, the agency gave no precise date for reopening. Wheeler said the phased reopening will be "measured and deliberate."

"The closure is the first step to return our employees safely to the office," an EPA spokeswoman said. "We will evaluate the criteria once again at the end of the closure period to inform the decision on reopening the office."

Employees will have maximum telecommuting flexibilities and won't be forced to return to the office through Phase 2 of President Donald Trump's three-step approach to reopening federal agencies and businesses, the spokeswoman said.

Data From CDC

Before starting the reopening, the EPA will conduct two reviews of health information regarding symptoms, tested cases, and local hospital capacity. The reviews will also take city, state, and county requirements into account, Wheeler said.

The agency is also using data from the Centers for Disease Control and Prevention and other expert data sources, which is being reviewed by EPA's own scientific experts, the spokeswoman said.

The move comes on the heels of the EPA last week moving its regional offices in Atlanta, Seattle, and Lenexa, Kansas, into Phase 1 of the White House's reopening plan.

The American Federation of Government Employees, which represents more than half of EPA employees, recently told Wheeler that no data exists to suggest it's safe to reopen, and that the union hasn't been invited to participate in the reopening talks.

In response, the EPA said it has held seven formal briefings with its unions to discuss the reopening plans, starting on March 10 and extending through May 22.

**Opportunities for Industry Action in Response to President Trump's Executive Order Limiting EPA and Other Federal Agency Use of Guidance**

https://www.natlawreview.com/article/opportunities-industry-action-response-to-president-trump-s-executive-order-limiting

By David M. Friedland, Pamela D. Marks, Alan J. Sachs

Stakeholders in the regulated community have a unique but time-limited opportunity to petition the U.S. Environmental Protection Agency (EPA) and other federal agencies to either add or remove specific guidance documents from their respective online portals. The Trump Administration has instructed each agency to ensure that, by June 27, these portals contain all guidance documents currently in effect. Going forward, agencies may not cite, use, or rely on any guidance that is not posted in their portals, except to establish historical facts. As discussed further below, this deadline stems from Executive Order 13891 (EO) issued by President Trump on October 9, 2019 entitled "Promoting the Rule of Law Through Improved Agency Guidance Documents."

## Practical Implications and Action Items for Industry

Guidance documents frequently present a double-edged sword for industry and other stakeholders. On the one hand, where statutes and regulations are unclear, guidance documents often help flesh out compliance obligations and provide the regulated community with certainty regarding an agency's interpretation of the law. On the other hand, as the EO states, guidance is often highly influential and relied upon by EPA, other environmental agencies throughout the world, and state regulatory agencies, but it bypasses public comment that would be required for rulemakings.

Because the use of guidance varies widely at EPA and other agencies, there does not appear to be a "one size fits all" strategy that all companies should pursue in addressing the EO and EPA rulemaking implementing it. However, here are some steps that can be taken to assess this evolving policy's impact:

1. **Evaluate whether a particular document is "guidance" in the first place.** The EO defines guidance as an agency statement of general applicability, intended to have future effect on statutory, regulatory, or technical issues, or an interpretation of a statute or regulation, with identified exceptions. The Office of Management and Budget (OMB) issued a memorandum on October 31, 2019 in which it stated that "guidance" excludes advisory or legal opinions directed to particular parties and other location- or fact-specific discussions. But the line between "guidance" and a fact-specific opinion is unclear. OMB also considers as guidance a document ostensibly directed to a particular party but designed to guide the conduct of the broader regulated public. EPA's proposed rule (not yet in the Federal Register) does not clarify the issue, and looks at whether a document is intended to have a substantial effect on regulated parties.
2. **Identify key guidance documents that your company or trade association relies, or has relied, upon to support important environmental compliance strategies**, and determine whether EPA (or other agencies) has included those documents in its Portal. This may be a big job and identifying every important document may not be feasible.
3. **Comment to EPA and other agencies regarding ambiguities that need to be resolved in the response to the EO**, including:

a. What is the agency's process for determining which documents are "guidance" and which are not?

b. Consider commenting on the proposed EPA rulemaking that would limit the agency's latitude to issue guidance. There may be differing views in the regulated community here. Some companies may argue that less guidance is the better result. Other companies may welcome guidance as an efficient way of obtaining some level of certainty where regulations or statutes are ambiguous.

c. What happens to all of the existing documents (guidance or not) that are not in the Portal? Will there continue to be a repository for those documents outside of the Portal?

d. How is the agency determining which guidance has been rescinded or superseded? If a guidance document is not in the Portal, does it mean that the agency has determined that it is rescinded or superseded?

4. **Petition EPA to withdraw specific guidance documents that are no longer appropriate for Agency reliance.** Some guidance is specifically superseded (e.g., the CAA Section 112 "Once in Always In" guidance). Other guidance may no longer be relevant or have been overtaken by later developments, though not specifically superseded. If you are aware of such guidance, you can ask EPA or other agencies to withdraw the no longer appropriate guidance. This may be done through the Portal itself.
5. **Petition EPA to add specific guidance documents.** The webpage for petitioning for withdrawal or modification of guidance documents already in the Portal is apparently not intended to allow petitions for inclusion of guidance documents not already in the Portal. It has no way to attach or upload documents. As a result, it may be advisable to submit an email request to add guidance documents to the specific EPA Office.
6. **Consider the status of key guidance issued by other federal agencies.** Other federal agencies have taken varying approaches as they implement the EO. For example, the U.S. Fish and Wildlife Service (FWS) and U.S. Department of Transportation (DOT) have each created a searchable database that provides an opportunity for members of the public to make additional suggestions via email. The U.S. Department of Agriculture (USDA) has taken a more minimalist approach, providing a list of links to other USDA service websites. By contrast, the U.S. Food and Drug Administration (FDA) has long maintained its own robust guidance database and has not, to date, indicated any changes to its historic practice related to the EO. Stakeholders should determine whether relevant documents have been included in these and other federal agency portals, and consider taking action if any omissions are identified.

Why are agencies developing their guidance portals now?

On October 9, 2019, President Trump issued the EO. The EO is critical of agency use of guidance. Specifically, it criticizes guidance because it "attempts to regulate the public without following the rulemaking procedures of the [Administrative Procedure Act]." Calling on agencies to treat guidance documents as non-binding both in law and in practice, and to make guidance documents readily available to the public, the EO ordered OMB to issue a memorandum requiring each agency to establish a single, searchable, indexed database (a "Portal") that contains all guidance documents in effect.

OMB issued that memorandum on October 31, 2019. To comply, each agency of the federal government must, in turn, review all of its guidance documents and rescind those guidance documents it determines should no longer be in effect. An agency cannot retain any guidance document in effect after June 27 unless it is in that agency's Portal, and agencies must include all future guidance documents in the Portal. Most critically for the regulated community, the EO states that "No agency may cite, use, or rely on guidance documents that are rescinded except to establish historical facts."

What action is EPA taking to Implement the EO?

EPA has established its Portal, available here. The Portal is organized by Office and is searchable. It already contains thousands of documents. The website advises that "the Agency is continuing to inventory guidance documents and anticipates providing updates prior to June 27, 2020."

EPA proposed a rule to implement the Executive Order on May 19. That proposal has not yet been published in the Federal Register, but upon publication, parties will have only 30 days to comment on it. Meanwhile, each EPA office – e.g., the Office of Water, the Office of Air and Radiation, the Office of Enforcement and

Compliance Assurance – is determining how to comply with the EO by evaluating which documents meet the definition of "guidance," and which guidance should be included in its Portal. Any serious review would involve thousands of documents. EPA and other agencies must post all guidance documents to the Portal by June 27. As noted above, now is the time to engage with EPA if your company or industry relies on guidance documents and wishes to advocate to EPA to retain them, or, conversely, to advocate that EPA should remove certain guidance documents.

**Trade War Tradeoff: How a Missouri Town Got America's Dirtiest Air**

https://www.nytimes.com/reuters/2020/06/02/us/02reuters-usa-pollution-newmadrid-insight.html

By Reuters

The residents of New Madrid County cheered in 2018 when a bankrupt aluminum smelter that rises over the Missouri region's vast farm fields restarted operations and hiring, thanks to aluminum tariffs levied in President Donald Trump's trade war.

The smelter reclaimed its place as one of New Madrid's biggest employers, with more than 500 workers. But the resurrection has come at a cost.

The soot pouring out of its smokestacks last year consistently produced the dirtiest air recorded in America, according to a Reuters review of pollution monitor data from the U.S. Environmental Protection Agency. (For a graphic on the pollution from the smelter's smokestacks, see https://tmsnrt.rs/2ZUAbrT )

The unhealthy air underscores the tension between industrial development and the environment as the Trump administration rolls back regulations on drilling, mining and manufacturing to boost the economy.

Charles Reali - the chief executive of Magnitude 7 Metals LLC, which owns the smelter - acknowledged the plant's high pollution levels in an interview with Reuters. But he said the only guaranteed way to fix the problem - installing a wet scrubber filtration system - would easily cost more than $100 million, an expense the plant's revenues will not support.

In a proposal that could directly impact New Madrid, Trump's EPA announced in April it would reject a proposal from the agency's scientific staff to tighten U.S. soot pollution standards. Health advocates claim the existing standards are too weak and are contributing to higher death rates during the coronavirus pandemic. New Madrid has recorded 15 cases of the disease and one death as of May 21, according to state and local authorities.

But in a county that ranks last or near the bottom in every quality of life and health standard, many people are willing to accept dirtier air in exchange for more jobs, according to interviews with two dozen residents there.

"People are worried about getting food on the table," said Marvelle Cranford, pastor of Friendship Church of God in Christ in Howardville, a small, predominantly African-American community about 5 miles from the plant. "Morale is good when people are employed. It's not good when they are not."

The elevated sulfur dioxide levels in the the area are not on the radar of U.S. Congressman Jason Smith, a Republican whose district includes New Madrid County. "Our office has not heard anything about this issue from the community," said Jonathon Matthews, a spokesman for the congressman.

SHORT SMOKESTACK

The Magnitude 7 Metals facility and the power plant next door that supplies its electricity together emitted about 30,000 tons of sulfur dioxide and nitrogen oxide pollution in 2019, according to the EPA data.

While the power plant produces the bulk of the chemicals, the smelter's shortest smokestacks – at about 50 feet – are one-sixteenth as tall, which means its pollution has an outsize impact at ground level.

Monitors stationed near the two facilities captured SO2 concentrations of at least 200 parts per billion (ppb) on 165 days in 2019, the first full year after its restart. That's nearly triple the EPA's standard for SO2 of 75 ppb.

This gave the area around the smelter the nation's highest median EPA air quality index score at 131 for 2019. Anything over 100 is considered unhealthy. The next highest median AQI reading in the country last year was 80, in California's San Bernardino County, where smoke from raging wildfires fouled the air.

So far this year, the plant's pollution exceeded EPA standards 119 times through May 24th, according to preliminary data kept by the Missouri Department of Natural Resources. By contrast, readings in 2017 – the year the monitors were installed, and before the smelter restarted – were consistently less than 10 ppb.

In a sign the poor air quality may be harming local residents, death rates in the county from chronic obstructive pulmonary disease (COPD) are 87% higher than in the rest of the state, according to the Missouri Department of Health and Senior Services. Health studies cited by the EPA show that just a few minutes of exposure to SO2 at concentrations of 200 ppb can restrict the breathing of people with asthma.

The smelter polluted the air before the smelter's bankruptcy, too, said Darcy Bybee, director of Missouri air pollution control program, but there were no air monitors to capture daily readings.

Bybee said people living outside the immediate perimeter of the two plants are breathing air that complies with federal standards, according to an evaluation by her program.

George DeLisle, coroner for New Madrid County, said the outcomes are likely exacerbated by poor behaviors like smoking. He did not comment on the impact of pollution from the plants.

Jayne Dees, administrator of the New Madrid County Health Department, said she cannot remember an instance when someone in the town raised a concern about pollution: "No one has ever brought it up."

'PRAYER MODE'

Construction of the smelter was completed in 1971, after Missouri's governor at the time convinced Associated Electric Cooperative to build the coal-fired plant next door to provide power. The smelter historically has been Missouri's largest user of electricity.

In 2014, the New Madrid smelter produced about 557 million pounds, or 253,000 tons, of primary aluminum, or about 15% of U.S. production, according to commodities consultancy CRU International Limited.

But the smelter's parent company landed in bankruptcy in 2016, under heavy debt and facing a flood of cheaper metals from China.

Former Glencore Plc trader Matt Lucke bought the plant out of bankruptcy in 2016 for about $14 million. And Trump's trade war later helped revive U.S. steel and aluminum producers.

But things haven't worked out as planned, said Reali, the Magnitude 7 Metals executive. The price per ton has dropped to about $1,500 due to soft demand and high global stockpiles, about $1,000 below the plant's business plan.

"We are in prayer mode," Reali told Reuters.Because of the bad air, the EPA is expected to rule on a recommendation by Missouri regulators to designate the perimeter of the smelter and power plant as a "nonattainment" area under the 2010 National Ambient Air Quality Standards.

That means the zone will have to eventually have come into compliance with clean air standards. Associated Electric Cooperative Inc, which operates the coal plant for its owners, declined to comment for this story.

The Trump administration's decision not to tighten soot standards could make it easier for Magnitude 7 Metals to comply with the EPA air standards. One way to do that would be to install a taller smokestack, according to Missouri DNR officials.

A decade ago, the former owner of the plant, Noranda Aluminum, proposed installing a new 233-foot tall smokestack to cast pollution farther away but never followed through.

Reali said such a job - with no guarantee of solving the plant's pollution problems - would cost around $14 million these days and his business probably wouldn't survive that financial hit.

"It was BS," Reali said. "They proposed it just to make things go away."

**EPA Releases New Guidance for Pesticide Handlers Amid Covid-19**
https://news.bloomberglaw.com/environment-and-energy/epa-releases-new-guidance-for-pesticide-handlers-amid-covid-19?context=search&index=17

By Adam Allington

The EPA has issued alternatives for pesticide handlers who are struggling to get personal protective equipment such as N95 masks during the coronavirus pandemic.

The temporary guidance issued Monday is aimed at agricultural workers who have complained about the scarcity of respiratory protection and respiratory fit testing, which checks whether a respirator properly fits the face of someone who wears it.

After supplies of the equipment known as PPE are exhausted, the Environmental Protection Agency says pesticide handlers can:

- Use National Institute for Occupational Safety and Health-approved respirators offering equal or greater respiratory protection than those required on the pesticide label;
- Hire commercial applicator services with enough respirators and respiratory protection capabilities;
- Use agricultural pesticide products that don't require respirators;
- Delay pesticide applications until another compliant option is available.

If the above options are exhausted, the agency offered other alternatives under strict terms, conditions, and requirements to minimize potential risks to workers.

They include reusing and extending use of disposable N95 filter facepiece respirators, using respirators that have expired or that have been certified outside the U.S., and delaying the annual respirator fit test.

The EPA said it would assess the continued need for and scope of the temporary guidance on a regular basis.

**EPA Finalizes Ethylene Oxide Reduction To Lower Cancer Risk**

https://www.law360.com/articles/1278582/epa-finalizes-ethylene-oxide-reduction-to-lower-cancer-risk

By Michael Phillis

The U.S. Environmental Protection Agency on Monday reduced how much of the carcinogenic chemical ethylene oxide that some chemical manufacturers can release, targeting a pollutant that has increasingly been the subject of lawsuits.

The agency said the changes are expected to reduce ethylene oxide emissions by about 0.76 tons annually, impacting nearly 200 chemical manufacturing facilities in Texas and Louisiana.

The update comes as manufacturers face litigation from some of those exposed to ethylene oxide and as some state leaders are pushing for tighter rules.

"EPA's actions underscore the Trump administration's commitment to addressing and reducing hazardous air pollutants, including ethylene oxide emissions, across the country," EPA Administrator Andrew Wheeler said in a statement. "This rule will provide improved compliance measure for industry while continuing to clean up our air."

The chemical facilities at issue should also see their hazardous air pollution in general go down by about 107 tons per year, according to the agency. That total is out of 2,558 tons per year of hazardous air pollution emitted by the group of facilities that were addressed by the agency's actions, according to the EPA.

The Clean Air Act requires the EPA to conduct residual risk and technology reviews to consider whether standards for a pollution source category need to be updated. For the miscellaneous organic chemical manufacturing source category, the EPA determined the cancer risk from these facilities was too high and that reductions were necessary.

Ethylene oxide is used to make products ranging from antifreeze to textiles and is also used to sterilize medical equipment. The agency said the update also includes requirements for "process vents, storage tanks and equipment in ethylene oxide service" as well as other provisions.

Emma Cheuse, an Earthjustice attorney, said it was "a notable victory for science" that the EPA belatedly recognized the health threats to those who live near facilities that emit ethylene oxide. But she said the measures should have gone further, adding that they still leave some people exposed to a cancer risk "as high as 200-in-1 million just from breathing air from chemical plants."

"It is especially disturbing that EPA has refused to strengthen the national protections from chemical plants as much as the law directs and has refused even to require common-sense fence line monitoring for pollution coming from these facilities at a time when the pandemic is disproportionately hurting communities of color, especially people who face cancer, respiratory, and other health problems linked with breathing toxic air," Cheuse said in an email.

The American Chemistry Council in a statement said the industry has significantly reduced ethylene oxide emissions and that the EPA has overestimated risk "by orders of magnitude." And some areas have moved away from tighter regulations. The Texas Commission on Environmental Quality **in May**, for example, said ethylene oxide is safer than previously thought and raised the amount that can be emitted by sources that get air quality permits form the agency.

The EPA said it is continuing to work on addressing ethylene oxide emission from sterilizers, which have been targeted in lawsuits. Sterigenics' sterilization plant in Illinois **was closed** in 2019 amid lawsuits over exposure to the chemical. And Union Carbine **is facing** a proposed class action in West Virginia over alleged health effects. In addition, the agency has helped state partners as they analyze emissions from facilities that might be a concern. The EPA said states like Illinois and Georgia have moved to reduce emissions of ethylene oxide as a result of the partnership.

In February, Illinois was part of a coalition of states that **urged** the EPA to adopt stricter national emission standards for ethylene oxide, saying current rules don't offer enough protections.

Cheuse praised the EPA for not following Texas' lead, accusing the sate of ignoring science that supports findings that ethylene oxide can cause harm.

The EPA classified ethylene oxide as a human carcinogen in December 2016. The agency's findings noted there was "strong evidence" that humans employed in ethylene oxide-manufacturing facilities and sterilizing facilities are at increased risk for both lymphohematopoietic and breast cancer.

**EPA updates Clean Water Act rule to help pipelines get permits from states**

https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/epa-updates-clean-water-act-rule-to-help-pipelines-get-permits-from-states-58662571

By Corey Paul

The U.S. Environmental Protection Agency released the final version of a rule meant to prevent states from blocking natural gas pipelines and other infrastructure projects by denying critical water quality permits.

Section 401 of the Clean Water Act gives states authority to review whether federally approved infrastructure complies with standards set for protecting local water quality. Major pipeline projects have hit permitting roadblocks in recent years during state Section 401 reviews.

The final EPA rule released June 1 makes it more difficult for states to use their Section 401 authority to block construction.

"We want to make sure that we are limiting the 401 process just to water quality," EPA Administrator Andrew Wheeler said in a briefing with reporters. "States may very well have other avenues through the permitting process for their other concerns on a project. But we have seen too many times — particularly in recent years, particularly in the Northwest and in New York — the misuse and abuse of the 401 authority for water quality when the cited reason has nothing to do with water quality."

Wheeler added that the rule change would prevent states from citing issues such as climate change as grounds for denial in Section 401 reviews.

The final rule confines the scope of the state reviews to potential impacts on water quality. It says state regulators should not consider factors related to other environmental concerns. And it mandates that states decide on permits within a year.

But experts on the Clean Water Act and energy infrastructure development have said the rule appears destined for lengthy court battles and states opposed to infrastructure projects would still find ways to block them, particularly if Congress is unwilling to change the underlying law.

"We certainly hope they won't just deny permits for other reasons," Wheeler said.

Industry groups welcomed the rule as a check against delays. Environmental groups worried that the shake-up of federal-state dynamics on infrastructure projects would come at the expense of states, which the groups said are better equipped to assess local water quality impacts.

Attorneys general of 22 states and Washington, D.C., had asked the EPA in October 2019 to withdraw the proposed rule, arguing it would "unlawfully usurp state authority to protect the quality of waters within their borders."

"The proposed changes largely violate the Clean Water Act, will have adverse and wide-ranging consequences beyond the purported impetus for these changes, and will not fix the alleged problems EPA aims to solve," the Sierra Club and other environmental groups said in comments on the rule submitted in October 2019.

The Sierra Club said the problems remain in a statement on the final rule. "The rule change severely limits the time and tools states and tribes have to properly evaluate the effect federally permitted projects, like pipelines and other fossil fuel facilities, would have on waterways," the group said.

The American Petroleum Institute, which represents oil and gas companies, said the rule "will provide a rigorous, consistent and transparent process for water quality certifications for energy developers and manufacturers, while ensuring that the public plays an important role in the regulatory process."

"We support the Clean Water Act, and though certain states have continued to go well beyond its scope for water quality certifications, we hope the addition of a well-defined timeline and review process will provide certainty to operators as they develop infrastructure projects that meet state water quality standards," Robin Rorick, the American Petroleum Institute's vice president for midstream and industry operations, said in a statement.

The trade group for U.S. pipeline companies also supported the new rule. "While the statute recognizes the distinctive roles of the federal and state governments in the environmental review process, the balance between those roles has been disrupted by some states that have viewed Section 401 as a means to stop certain interstate pipeline and energy infrastructure projects," Interstate Natural Gas Association of America interim President and CEO Alex Oehler said in a statement. "This final rule clarifies the roles of federal, state and tribal authorities during the Section 401 certification process, realigning those roles with the statute."

Congress made sure that states had a role under the Clean Water Act in approving infrastructure that could compromise water sources. But the Trump administration and the gas industry have accused some state regulators, especially in New York, of abusing the authority to block projects.

Congress also stipulated that states should complete reviews within a reasonable amount of time, not to exceed a year, or they could waive their authority to federal agencies. The Section 401 certification process has extended well beyond one year in recent cases under a practice in which states have applicants re-apply with the effect of resetting the clock.

New York environmental regulators on May 15 rejected a water permit for Transcontinental Gas Pipe Line Co. LLC's Northeast Supply Enhancement pipelines for the third time in as many years, blocking a project that would deliver more gas into downstate New York and Long Island. Days later, owner Williams Cos. Inc. said it had no immediate plans to refile but continued to believe in the fundamentals of the project.

Betsy Southerland, a career EPA official who retired as the director of science and technology in the Office of Water in 2017, said the rule would make it much more difficult for states to attach conditions to water permits to protect water resources.

"This rule represents a big constraint for states because often the first draft applications lack the details needed for them to thoroughly evaluate impacts," Southerland said in an email. "States wanted the clock to start only after they deemed the application complete, not from the moment the first draft of the application was sent to them. The rule also would limit the issues that states could use to ask for rejection or modification of the federal permit."

**Bayer Fights Jury Loss in Bid to Minimize Roundup Payouts (1)**

https://news.bloomberglaw.com/product-liability-and-toxics-law/bayer-fights-jury-loss-in-bid-to-minimize-roundup-payouts-1

By Joel Rosenblatt

If Bayer AG wants to keep total Roundup liability capped at $10 billion, it may be crucial to get a 2018 California court verdict overturned.

On Tuesday, the German chemical giant will ask the state appeals court to toss a jury conclusion that Roundup caused grounds keeper Lee Johnson's cancer. Johnson was awarded $289 million before a judge cut the damages to $78.5 million. By comparison, the company has been reaching settlements in thousands of other cases that range from a few thousand dollars to several million per claim, people familiar with those agreements said last month.

While Bayer has reached verbal deals on many of the estimated 125,000 Roundup lawsuits in the U.S., tens of thousands remain unresolved. Legal experts say the company wants to limit payouts on those claims, and to reduce the incentive for new lawsuits, by fighting the only three cases that have gone to trial -- all losses, including a $2 billion award to a California couple in 2019 that was later cut to $86.7 million by a judge.

"It's a gamble by Bayer, but a reasonable one," said Anna Pavlik, an attorney who provides legal and regulatory analysis for investors at United First Partners LLC in New York. "If Bayer were to settle the cases with jury verdicts now, those verdict numbers could be perceived by the lawyers in the remaining plaintiff cases as a tempting benchmark, and would likely push the outcome of the negotiations toward a higher ultimate number."

Bayer shares rose as much as 5.4% in Frankfurt trading Tuesday, reaching the highest level in more than a month.

The company has been working to end the costly legal battle it inherited when it acquired Monsanto in 2018. Since that deal, Bayer lost those three court cases and new claims about Roundup surged, dragging down shares more than a third and wiping billions of dollars from the company's market value.

Read More: Why Bayer Shares Face Such Trials Over Roundup

Because there's still a serious risk that the Johnson jury verdict is upheld, the company may be pushing to reach agreements on the global settlements before the state appeals court rules, according to Pavlik.

Bayer declined to comment on its legal strategy. But in a statement, the company said the Johnson verdict "should be reversed because the evidence at trial did not meet the legal burden required to prove causation and failure to warn claims under California law."

A key Bayer argument is that federal regulation of Roundup preempts laws of the state, which could undermine evidence that proved so damaging at trial and dissolve tens of thousands of pending cases.

Johnson's lawsuit is based on California law, including a claim that Roundup's cancer risk should be disclosed on a warning label. Bayer argues that it can't add a cancer warning or reformulate the herbicide without the approval of the U.S. Environmental Protection Agency, which says Roundup doesn't cause cancer.

## No Warning

"EPA would have rejected a cancer warning had Monsanto proposed one," Bayer said in a court filing. The agency "would not possibly have required a cancer warning for a product that it determined was not likely to be carcinogenic."

While there's a "strong likelihood" that Bayer's argument will win on appeal, the company is facing liability exposure of hundreds of billions of dollars if there are more verdicts like the three it's already faced, said Holly Froum, a legal analyst for Bloomberg Intelligence. Given timing pressure and comparable mass-tort settlements, Bayer may spend between $10 billion and $12 billion to resolve the Roundup litigation, according to Froum.

In May, the San Francisco-based appeals panel told the parties to present arguments assuming the panel agrees that Johnson's award for future, noneconomic damages should be reduced.

According to Brent Wisner, who won Johnson's case at trial, that move by the appeals court is "a strong suggestion" that it "is rejecting the preemption argument and is more focused on the amount of damages -- not the viability of the verdict itself."

An appeals court loss for Bayer could spark more Roundup lawsuits, just as the original jury verdict did, Wisner said.

Mike Miller, Johnson's lawyer for Tuesday's appeal, didn't return a phone call or an email seeking comment.

## Bayer's Leverage

Still, Bayer has leverage in its settlement talks, especially during the pandemic, said Thomas G. Rohback, a trial lawyer at Axinn in New York who isn't involved in the litigation.

The Roundup lawsuits Bayer faces are filed by users who developed non-Hodgkin lymphoma. For plaintiffs who are already ill, the coronavirus crisis has only added urgency to settle with a corporation willing to finance "multiple layers of appeals" in the three verdict cases, Rohback said.

"Time is something people don't have," Rohback said. The pandemic has created "a good environment for pressuring plaintiffs to settle."

The case is Johnson v. Monsanto, A155940, California Court of Appeals (San Francisco).

**EPA limits states and tribes' ability to protest pipelines and other energy projects**

https://www.washingtonpost.com/climate-environment/2020/06/01/epa-limits-states-tribes-ability-protest-pipelines-other-energy-projects/

By Juliet Eilperin

The move changes the way the Clean Water Act has been applied for half a century.

The Environmental Protection Agency finalized a rule Monday curtailing the rights of states, tribes and the public to object to federal permits for energy projects and other activities that could pollute waterways across the country.

The move, part of the Trump administration's push to weaken environmental rules it sees as standing in the way of new development, upends how the United States applied a section of the Clean Water Act for nearly a half century. The energy industry hailed the change as a way to speed up pipelines and other projects, while environmentalists warned it could undercut state and tribal efforts to safeguard rivers and drinking water.

The new rule would set a one-year deadline for states and tribes to certify or reject proposed projects — including pipelines, hydroelectric dams and industrial plants — that could discharge pollution into area waterways. It also would limit any reviews to include only water quality impacts, based on a more narrow definition the Trump administration finalized last year.

In a call with reporters Monday, EPA Administrator Andrew Wheeler argued that some states had abused the law in the past, using long delays to trap energy-related projects "in a bureaucratic Groundhog Day." The change would give states "more than enough time" to scrutinize proposed projects, while preventing them from holding them "hostage" for lengthy periods, he said.

"Our system of republican democracy does not allow for one state to dictate standards or decisions for the entire nation," Wheeler said.

The change stems from an executive order President Trump issued in April 2019, in which he instructed federal agencies to do everything possible to pave the way for energy infrastructure. "The president is very happy about this," Wheeler said, as he congratulated the agency's staff for its work on the rule.

Robert Irvin, president of the environmental group American Rivers, said in an interview that the shift would undercut the powers Congress when it passed the Clean Water Act in 1972, at which point it "gave states the authority to do more than the federal government is doing in order to clean up our rivers and have fishable, swimmable waters."

"This administration is happy to put the responsibility for dealing with the pandemic on the states, but they're far too quick to strip states of authority when they're trying to protect rivers and clean water," Irvin said.

Some companies, however, have complained that certain states have used Section 401 of the Clean Water Act to unnecessarily delay key energy infrastructure projects, including pipelines, coal terminals and hydroelectric dams.

They frequently cite two pipeline projects that encountered obstacles in New York state in recent years: the Constitution natural gas pipeline, which planned to ship gas from Pennsylvania's Marcellus shale to New York

before it was shelved, and the Northeast Supply Enhancement (NESE) Pipeline, which would also have brought gas from Pennsylvania to New Jersey and then onto New York City. The New York Department of Environmental Conservation just denied a permit to the NESE Pipeline last month, based on its "inability to demonstrate" how it would meet all applicable water standards. New Jersey denied its 401 water certification permit a year ago.

Another project that stalled was the Millennium Bulk Terminal, a $680 million coal export facility that Washington state rejected in September 2017.

Robin Rorick, vice president for midstream and industry operations at the American Petroleum Institute, said in a statement that his members support the long-standing environmental law, "though certain states have continued to go well beyond its scope for water quality certifications."

"We hope the addition of a well-defined timeline and review process will provide certainty to operators as they develop infrastructure projects that meet state water quality standards," Rorick said.

Sen. John Barrasso (R-Wyo.), who chairs the Senate Environment Committee, said in a statement that the rule would make it easier for his state to sell coal elsewhere in the United States and overseas. "The state of Washington has hijacked this process and blocked Wyoming coal from being exported," he said.

But Association of Clean Water Administrators Executive Director Julia Anastasio, who represents state water permit administrators in all 50 states, said in a phone interview that the rule doesn't respect state roles in maintaining water quality and does not address a 1994 Supreme Court ruling empowering them to set "other limitations" that could ensure a project meets "any other appropriate requirement of state law."

"It's really not respecting the rule that states play as co-regulators," Anastasio said.

Both Democratic attorneys general and lawmakers vowed to fight to reverse the rule. Rep. Debbie Dingell (D-Mich.) tweeted, "This decision is unconscionable & I'll do everything in my power to oppose it." And California Attorney General Xavier Becerra suggested he and others would sue the EPA, saying in a statement, "We won't stand idly by as they rip away our authority under the law to preserve water quality."

**Clean Water Act Rollback: Trump's EPA Limits States' and Tribes' Rights to Block Pipelines**

https://www.ecowatch.com/trump-epa-clean-water-rule-pipelines-states-tribes-2646147091.html?rebelltitem=1#rebelltitem1

By Olivia Rosane

The Trump administration has finalized a rule making it harder for states and tribal communities to block pipelines and other infrastructure projects that threaten waterways.

The change concerns Section 401 of the Clean Water Act, which essentially gives states and tribes veto power over projects that would hurt their water quality, The Hill explained. The changes, announced by the Environmental Protection Agency (EPA) Monday, give states and tribes a one-year deadline for reviewing

projects and narrow the scope of what they can consider to only water issues, The New York Times reported. They may no longer block projects because they would contribute to the climate crisis.

"This is a dangerous mistake," director of federal water policy at the Natural Resources Defense Council (NRDC) Jon Devine said in a statement. "It makes a mockery of this EPA's claimed respect for 'cooperative federalism.'"

In recent years, states have used Section 401 to block a number of high profile fossil fuels projects, The Washington Post reported. Last month, New York and New Jersey blocked permits for the Northeast Supply Enhancement Pipeline, which would have carried fracked natural gas from Pennsylvania through both states. New York also blocked the Constitution pipeline that would have also moved gas from Pennsylvania. And Washington state blocked a $680 million coal export facility in 2017.

Climate activists have seen Section 401 as a useful tool for keeping fossil fuels in the ground, NPR explained. But industry groups and the Trump administration have accused states of abusing their veto powers, and President Donald Trump issued an executive order in April 2019 mandating federal agencies ease the completion of energy infrastructure projects, according to The Washington Post.

"Today, we are following through on President Trump's Executive Order to curb abuses of the Clean Water Act that have held our nation's energy infrastructure projects hostage, and to put in place clear guidelines that finally give these projects a path forward," EPA Administrator and former coal lobbyist Andrew Wheeler said in a statement reported by The Hill.

Fossil Fuel groups welcomed the change.

"We hope that EPA's action today will help end the abuse of the section 401 permitting process, which has been used to obstruct projects for reasons that had nothing to do with protecting water quality," National Mining Association President and CEO Rich Nolan told NPR.

Lawyer, former EPA employee and Clean Water Act expert Mark Ryan told The Hill that the changes were a major departure that would put states at a disadvantage.

"This changes the balance of power that has existed over the last 40 years from the states to the applicants," he said.

He explained that applicants would be incentivized to run down the clock on states by withholding information. However, he also thought it was unlikely the changes would hold up in court.

"The new rule will be very vulnerable to a legal challenge; the EPA will have a very hard time convincing the Supreme Court that its current interpretation of the Clean Water Act is correct," he said in a statement emailed to EcoWatch.

And a legal challenge looks likely.

"We won't stand idly by as they rip away our authority under the law to preserve water quality," California Attorney General Xavier Becerra, whose state has sued the Trump administration 82 times, said in a statement reported by The Washington Post.

**EPA permit rule faces 'vulnerabilities' in courts, Congress**

https://www.eenews.net/eedaily/2020/06/02/stories/1063295711

By Hannah Northey

A final EPA rule limiting state oversight of water permits for controversial pipelines and export terminals drew widespread Republican praise yesterday — as well as Democratic criticism and warnings from experts that the agency is on shaky legal and political ground.

Republicans in both chambers hailed the action as a boost for energy project developers facing "political gamesmanship" from states citing issues other than water quality — namely, air pollution and climate change — when denying permits under Section 401 of the Clean Water Act.

That praise was met with a tough rebuttal from Democrats, who warned that the rule would undercut authority Congress had originally granted states when it passed the federal law in 1972 to protect waters and wetlands.

"In a departure from decades of mutual cooperation, this rule will severely limit the time and scope of states' review of federal energy project permits, rendering states virtually powerless to stop a harmful federal project from being built," said Sen. Tom Carper of Delaware, ranking member on the Environment and Public Works Committee.

House Energy and Commerce Chairman Frank Pallone (D-N.J.), in a tweet, took aim at the president: "Trump only supports states' rights when it's convenient."



Beyond the rhetoric, advocates see Democrats using the Congressional Review Act next year to overturn the rule — that is, if they take over the White House and the Senate.

## 'Hijacked' process

EPA's rule sets a one-year deadline for states and tribes to certify or reject applications for water permits. States would only be able to consider water quality — not climate change or air pollution — when making such decisions (*Greenwire*, June 1).

Senate Environment and Public Works Chairman John Barrasso (R-Wyo.) yesterday led a chorus of GOP support for EPA's final rule, saying it will ensure states can no longer abuse the water certification process for political gain.

Barrasso and his other colleagues said the rule will open markets to energy producers in their states — from natural gas to coal.

Wyoming is the country's top coal-producing state and relies on export terminals to reach markets abroad. Washington state denied permits for a key project coveted by Western coal miners (*Greenwire*, Aug. 16, 2018).

"The state of Washington has hijacked this process and blocked Wyoming coal from being exported. The Trump administration's rule will allow important energy infrastructure projects to get done faster," he said. "It's an important step in the right direction to help Wyoming coal and other energy markets."

Barrasso has held hearings on the issue and is leading legislation, S. 1087, to also limit state power with water quality reviews (*E&E Daily*, Nov. 20, 2019).

Sen. Shelley Moore Capito of West Virginia, one of the bill's co-sponsors, said gas producers would not be able to find markets in New England and beyond, and states would be forced to buy dirtier fuels from "hostile regimes like Russia" if much-needed gas pipelines didn't obtain critical permits.

Section 401 of the Clean Water Act, she said, has been "abused by liberal state governments for years to politically attack the fossil fuel industry," and she applauded EPA for ending what she said amounts to "political gamesmanship" around the Clean Water Act.

'Political vulnerabilities'

Mark Ryan, a former Clean Water Act attorney in EPA's Region 10, said a Democratic administration and Congress next year could overturn the rule using the Congressional Review Act.

"I think there are both legal and political vulnerabilities here," said Ryan, who worked under both Republican and Democratic administrations.

The Congressional Review Act gives Congress 60 legislative days to overturn a rule with fast-track consideration. Republicans used it to kill numerous Obama-era actions.

Some agencies have been operating under a May 19 deadline to prevent regulations from being vulnerable under the CRA, according to sources.

But even if the GOP can defend the Trump rule on Capitol Hill, Ryan sees a legal challenge from states that do not want to lose their ability to review permits.

Many Democrats have reacted to several Trump regulations with relative calm, expecting the courts to intervene.

"The Trump administration is, once again, flouting the rule of law, this time by denying states their legal right to determine whether major projects violate state water quality standards," said David Hayes, executive director of the State Energy & Environmental Impact Center at New York University School of Law and a former Interior Department official in the Clinton and Obama administrations.

"The rule undercuts the ability of states to protect their communities from water pollution associated with pipelines, mines and other infrastructure projects, turning the Clean Water Act's cooperative federalism structure into a federal cram-down that casts aside state interests," Hayes continued.

Despite the opposition, the energy sector — from pipelines to hydropower developers — welcomed the rule.

Malcolm Woolf, president and CEO of the National Hydropower Association, said projects often languish for years awaiting a state decision on the water certification, sometimes a decade or more.

"EPA's new regulations will provide much-needed timeliness and certainty to water quality certification for hydropower licenses by enhancing coordination between federal and state review and ensuring that certification

requests are acted upon within a reasonable period of time, which the Clean Water Act defines as not longer than one year," he said.

Alex Oehler, interim president and CEO of the Interstate Natural Gas Association of America, said the final rule recognizes the distinctive roles of the federal and state governments in the environmental review process.

"The balance between those roles has been disrupted by some states that have viewed Section 401 as a means to stop certain interstate pipeline and energy infrastructure projects," Oehler said.

**Methane rule heads to White House for speedy review**

https://www.eenews.net/climatewire/2020/06/02/stories/1063293991?utm_medium=email&utm_source=eenews%3Aclimatewire&utm_campaign=edition%2BiZ%2B%2FftFV%2B2LxUfHtN5bxJQ%3D%3D

By Jean Chemnick

EPA sent the White House its final rules Friday to repeal and replace Obama-era controls on oil and gas methane, paving the way to end federal regulation of the powerful greenhouse gas by the end of July.

The action was revealed in an EPA court filing yesterday and first reported by Argus Media. The rule as of yesterday had not appeared on a website maintained by the Office of Management and Budget where regulations under review are disclosed.

In the court filing, EPA said it had asked OMB to review the rule "on an expedited basis within 30 days." If that request is granted, it said, the regulatory "package" would be final by the end of next month.

An EPA spokesperson said the package comprises two rules that were proposed separately but will be finalized together. Both make substantial changes to an Obama-era rule that has been in place for four years.

"EPA expects to issue the final regulations concurrently after interagency review is complete," the spokesperson said.

The first of the two, proposed in 2018, would reduce the frequency with which oil and gas companies are required to monitor and repair leaks to their well sites and compressor stations, which are major sources of methane. The second is EPA's proposal last year to stop regulating methane from new petroleum operations and instead target an ozone precursor.

"Those proposals by EPA were deeply flawed and problematic for different reasons," said Rosalie Winn, a lawyer with the Environmental Defense Fund. "The combined impact of the two rules, if EPA finalizes both of them as proposed, is to dramatically increase pollution from the oil and gas sector."

The new rule for volatile organic compounds, or VOCs, would curb methane leakage from wellheads as a co-benefit but would leave emissions from transmission and storage unchecked.

It's also a legal maneuver to take a future rule for oil and gas methane emissions from existing sources off the table indefinitely. EPA filed its disclosure in the U.S. District Court for the District of Columbia, where 14

states and the District of Columbia are suing to force EPA to promulgate a rule controlling methane from existing sources across the oil and gas sector. EDF is an intervenor.

The Obama administration ran out of time to complete a rulemaking for the more than 850,000 older petroleum industry sources leaking methane across the country. The new source rule triggers a Clean Air Act requirement that EPA consider doing that, but not if the new source rule is rescinded.

EPA notes in yesterday's court filing that the new source rule is the "statutory predicate" for any existing source standard, and is soon to be rolled back.

The Trump EPA has some support from the petroleum industry for doing that. But there's a growing divide between trade groups and many independents who oppose direct federal methane regulation and the oil majors, which largely support a policy more in line with the Obama EPA's rule.

The White House Office of Information and Regulatory Affairs (OIRA) staff raised many questions with EPA during interagency review last year about the way the agency wrote its cost-benefit analysis for the proposal.

But Amit Narang of the advocacy group Public Citizen said EPA's apparent confidence that it could negotiate a commitment from OIRA to clear the final rule in a month showed White House career staff had been overruled. A long-delayed rule for power plant mercury raised many of the same objections about how costs and benefits are weighed but was finalized in April with no changes.

"After the mercury rollback, it doesn't look like OIRA's very interested in forcing EPA to follow what OIRA said are best practices in terms of counting co-benefits during cost-benefit analyses," Narang said. "They've just surrendered, and EPA has won that policy fight."

**Court Weighs Ruling In Major Suit Over Adequacy Of Oil & Gas GHG Review**

https://insideepa.com/daily-news/court-weighs-ruling-major-suit-over-adequacy-oil-gas-ghg-review

By Dawn Reeves

A federal court is weighing a ruling in a long-pending suit with potentially sweeping implications for the Interior Department's (DOI) oil and gas leasing program after briefing concluded, as environmentalists are seeking to force officials to conduct a more robust climate change analysis during environmental reviews of new leases.

DOI and its allies are urging the U.S. District Court for the District of Columbia to uphold its revised National Environmental Policy Act (NEPA) review of hundreds of challenged leases in Wyoming, which it conducted after the court rejected its earlier review, finding it did not consider the full scope of greenhouse gas emissions.

But environmentalists say the new review falls short and are asking the court to vacate the environmental assessment (EA) and the 282 leases covering 300,000 acres of public land.

The case, *WildEarth Guardians, et al. v. Bernhardt, et al.*, first filed in 2016, is before Judge Rudolph Contreras, who could schedule a hearing or decide the issue on the briefs.

Last March, Contreras issued a landmark ruling requiring DOI's Bureau of Land Management (BLM) to consider the cumulative greenhouse gas impacts of its oil and gas drilling lease approvals in Wyoming, a decision that environmentalists hailed as one that could ultimately force the administration to consider GHGs for its entire oil and gas leasing program.

While Contreras stopped short of ordering a programmatic environmental impact statement (PEIS), he "set a pretty high bar" for how BLM should respond, advocates said at the time.

Contreras is also hearing a separate case with the same name, filed in January, where environmentalists are seeking to expand his original ruling rejecting the GHG consideration to 2,000 oil and gas leases across several other Western states. In that case, he has ordered the parties to send him a proposed briefing schedule by June 5. Most recently, the Western Energy Alliance moved to intervene on DOI's behalf.

In the instant case, DOI, Wyoming and Utah, and the American Petroleum Institute (API) and other industry groups filed final briefs on May 18. They were responding to environmentalists' May 1 filing urging Contreras to vacate the leases, after environmentalists filed an amended complaint in September in response to the revised EA.

"BLM, however, continues to treat compliance with NEPA as a paperwork exercise," the environmentalists say. "After this Court reversed BLM's prior assessment and specifically directed the agency to give 'serious consideration' to climate impacts . . . BLM slapped together its Supplemental EA in just weeks, after allowing only six business days for public comment. Given BLM's rushed approach, it is no surprise that the agency's analysis is riddled with errors that call into question the reliability of BLM's analysis and shows that the agency took anything but a 'hard look' at the climate impacts of the challenged lease sales."

Among the flaws cited in the brief are that BLM failed to quantify total lifetime GHG emissions, that it underestimated direct and indirect emission rates, that it failed to assess reasonably foreseeable future emissions from regional and national actions, that it failed to make a convincing case for a finding of no significant impact (FONSI), and that it cannot justify its failure to assess the significance of cumulative GHG emissions.

**Direct, Indirect and Cumulative GHGs**

But DOI says that it adequately considered direct, indirect and cumulative GHGs, and that its discussion of the global carbon budget and FONSI complied with NEPA. It asks Contreras to uphold the EA but adds that if he finds fault with it, he should remand it back to BLM for additional work rather than vacate it, to avoid disruptions.

API also urges the court not to vacate the leases "under any circumstances" because "this Court has already recognized that a reviewing court is not required to vacate every agency decision that violates NEPA, and that where, as here, the alleged violation amounts merely to a failure fully to consider potential environmental impacts of a decision." There are no new circumstances to warrant vacatur, it adds.

DOI and its supporters submitted similar March 9 filings arguing that the supplemental EA corrected aspects of the leasing decisions the court initially found lacking and should be upheld.

**5th Circuit Rules EPA Need Not 'Second Guess' State Air Permit Decisions**

https://insideepa.com/daily-news/5th-circuit-rules-epa-need-not-%E2%80%98second-guess%E2%80%99-state-air-permit-decisions

By Stuart Parker

June 1, 2020

In a win for EPA, the U.S. Court of Appeals for the 5th Circuit has ruled that the agency need not "second guess" states' Clean Air Act permitting decisions when it reviews so-called Title V operating permits, setting a court precedent that will hinder environmentalists' ability to have courts scrutinize certain conditions of state-issued permits.

In its unanimous May 29 opinion in *Environmental Integrity Project (EIP), et al. v. EPA*, the court rejects the effort by EIP and Sierra Club to use the Title V permit of an Exxon petrochemical facility in Texas to attack an underlying air permit that the environmental groups say is too lenient. The ruling appears to be the first to reach the merits of the Trump EPA's narrow policy for Title V permit review, and may influence state and federal permitting actions beyond just the 5th Circuit states of Louisiana, Mississippi, and Texas.

Title V permits are "umbrella" permits for major industrial sources that must include all "applicable requirements" of the Clean Air Act outlined in underlying air permits, such as "Title I" new source review (NSR) permits. As such, Title V permits do not typically add substantive emissions control requirements.

While the Obama EPA used reviews of Title V permits to sometimes fault underlying NSR or other permits, requiring substantive changes, the Trump EPA under former Administrator Scott Pruitt in 2017 reverted to an older EPA legal interpretation, established after the air law amendments of 1990. Under that older policy, EPA does not delve into the substance of underlying permits -- or states' decisions on whether "major source" NSR permits are required in the first place. EPA will not "second guess" states' decisions under the restored policy.

In his opinion on behalf of himself and fellow Judges Catharina Haynes and James Graves, Judge Stuart Kyle Duncan finds that, "We find persuasive EPA's position that Title V lacks a specific textual mandate requiring the agency to revisit the Title I adequacy of preconstruction permits. Our own review of Title V confirms that it contains no such explicit requirement, nor any language guiding the agency on how to perform a review of that nature."

The ruling is not unexpected because the opinion reflects the skepticism of the judges over environmentalists' case expressed at June 10 oral argument.

The court relies on the "mild" deference afforded by courts to federal agencies over matters of statutory interpretation under the Supreme Court's *Skidmore* doctrine, rather than the further-reaching *Chevron* deference. "Title V does not tell EPA to reconsider new-source review in the course of Title V permitting," the court finds.

The underlying permit at issue in *EIP* applied a "plantwide applicability limit" (PAL) to Exxon's Baytown, TX, olefins plant, under which it could increase emissions from specific points in the facility without triggering NSR and potentially tougher control mandates, if the plant did not violate the overall emissions limits specified in the PAL.

Environmentalists oppose the PAL because they say it could allow industry to flout NSR and worsen air pollution. EPA in 2018 rejected their 2016 petition for an agency objection to the Title V permit, which environmentalists said the agency must revise in order to address problems with the PAL.

The court does not reach the merits of the PAL, but notes that environmentalists can still challenge PAL permits and other Title I permits in other proceedings, such as state permitting reviews or citizen suits challenging violations of Title I permits. "All we address here is EPA's view that Title V permitting is not the appropriate vehicle for reexamining the substantive validity of underlying Title I preconstruction permits," Duncan writes.

**'Nationally Applicable' Dispute**

The ruling appears to be the first to reach the merits of the Title V review policy Pruitt established in his 2017 denial of a petition for objection filed by Sierra Club over the Title V permit of Pacificorp's Hunter coal-fired utility in Utah.

The D.C. Circuit in June 2019 rejected a challenge to the *Hunter* determination on the grounds of incorrect venue, finding that EPA's policy determination on the Hunter plant was not "nationally applicable," and hence the case belongs in regional court.

Environmentalists insisted that the determination was a national policy that EPA has subsequently cited to justify various other Title V decisions around the country, but the D.C. Circuit agreed with EPA that it was a source-specific finding only applicable to one facility.

However, litigation against the *Hunter* doctrine continues in the 10th Circuit, in *Sierra Club v. EPA, et al.* At oral argument in that suit March 10, judges pressed environmentalists and EPA on why the agency should or should not have rejected Sierra Club's petition for objection, But the court did not indicate which way it might rule. A ruling by the 10th Circuit would apply in Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming.

**EPA Warns On Disinfectant Device Claims, Rejects Call For Standards**

https://insideepa.com/daily-news/epa-warns-disinfectant-device-claims-rejects-call-standards

By Diana DiGangi

June 1,2020

EPA is warning manufacturers and others not to make claims about the effectiveness of pesticidal devices, such as ozone generators and UV lights, in addressing the coronavirus, though the agency is also rejecting calls from industry groups to craft efficacy standards for the products given uncertainty about their regulatory status.

In a compliance advisory issued June 1, EPA reiterated its commitment to its List N registered products that it endorses for use against SARS-CoV-2 and other viruses, and reminds consumers and manufacturers that EPA cannot confirm whether other devices are effective against the virus because, unlike chemical pesticides, the agency does not review their safety or efficacy.

"Please note that ozone generators, UV lights and other pesticide devices may not be able to make claims against coronavirus where devices have not been tested for efficacy or safety for use against the virus causing COVID-19 or harder-to-kill viruses," EPA said in the advisory.

"In addition, because EPA does not review these data as part of a registration review process, these claims are not supported by any government review," the advisory adds.

Such warnings are likely to create additional uncertainty for manufacturers of such products, who before the agency issued the warning were urging the agency to craft efficacy standards for the devices. They fear that without such standards, they could be subject to agency enforcement actions or other liability in a regulatory gray area if they sought to import, distribute or sell devices that made anti-viral claims.

"There is very little EPA guidance in this area," an industry attorney tells *Inside EPA*. "It's an area where there's potential for uncertainty in the regulated community. I haven't seen EPA specifically question the data that might substantiate particular claims, but it wouldn't surprise me if that's coming, and it's certainly a risk that the regulated community needs to be aware of."

At issue are devices that operate by physical or mechanical means, rather than by using a substance with antimicrobial properties. This includes devices that use UV light to disinfect, or a filter that claims to filter out microbes or viruses, as well as air treatment and water treatment units.

Though these devices are not registered or preapproved by EPA, they are still subject to regulation under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the attorney says, and subject to prohibition against false or misleading claims as other regulated substances are.

For example, EPA notes in its advisory that such devices must have an EPA establishment number, which identifies where a product was produced, but they will not have an EPA registration number because they are not subject to the same registration requirements as pesticides.

But the industry attorney says that this regulatory gray area could become a legal and logistical problem for manufacturers. These devices, if their efficacy is questioned by EPA, could be blocked from entry at the border, subjected to stop-sale orders, or face a penalty action, despite the lack of efficacy standards from the agency, the attorney says.

**Fraudulent Claims**

The industry concerns are arising as EPA is generally working to relax supply chain and other anti-microbial rules governing disinfectants to ensure an adequate supply of the substances to address the coronavirus.

Since March, EPA has been using its authority under FIFRA to make sure disinfectants effective against SARS-CoV-2, the novel coronavirus responsible for the COVID-19 pandemic, continue to be available -- even as demand has increased. In some cases, the agency has even stretched its FIFRA authority to allow, or in some cases encourage, use of substances that are not registered for such use.

Last month, the agency took a series of steps aimed at bolstering anti-viral supplies for the food processing sector, which has been hit hard by the pandemic.

But the attorney notes that EPA has identified fraudulent claims against products claiming to address COVID-19 as a current enforcement priority for the agency. For example, EPA Administrator Andrew Wheeler has threatened legal action against retailers who allowed the sale of third-party unregistered disinfectant products.

But manufacturers of disinfectant devices, who have no efficacy standards to follow, may run afoul of EPA without even realizing it, the attorney says.

"It's more challenging for distributors of devices to confirm compliance with FIFRA," the source says, "because there is no preapproval requirement, so there's no EPA registration of the product that says 'these are the claims that can be made,' and there are no efficacy or safety standards that EPA has issued to help the regulated community define what claims EPA considers to be appropriate for these types of products."

Despite such concerns, the agency does not appear to be planning to provide more guidance, though EPA scientists are working to study the efficacy of disinfectant devices.

"Current efforts by the Office of Research and Development may support development of efficacy test methods for UV lights and ozone generators in the future; however, at this point in time, EPA does not have efficacy protocols and/or standards for such devices," an agency spokesperson said in a statement shortly before the advisory was issued.

**'Useful Options'**

While the agency does not maintain a set of standards for devices, it is working to gather efficacy and safety data on them, as well as developing methods to test disinfectant efficacy on semi-porous materials like rubber, and disinfectant methods for non-launderable fabric surfaces, like train seats.

"UV and ozone are routinely used in water disinfection, and UV is often used in the healthcare setting," said EPA engineer Shawn Ryan in a May 27 webinar. "UV and ozone really do work well, but the question is, let's get them out of those settings and then how well do they work? How well can they be applied to different environments that we encounter every day? They could be very useful options, but we need to address some of the initial concerns or challenges that we have for these technologies."

Some of the challenges for using devices to kill SARS-CoV-2 is that UV is prone to an efficacy drop-off as distance from the light source increases, or due to shading, Ryan says. For instance, UV lights installed in a ceiling would not be effective under the handrails of a subway car.

Additionally, EPA has questions about what concentration levels of ozone are required to kill viruses, and what contact time of steam is necessary to disinfect surfaces, especially porous materials.

"So that's the purpose of the testing that we're working on, we're looking at the efficacy of various surface protectants and how well they do as disinfectants against SARS-CoV-2, how well do they work over time -- a week, a month, after their application?" Ryan said. "And how well do they hold up to normal cleaning and normal use?"

**Rejecting Criticism, EPA Touts CWA 401 Rule's 'Cooperative Federalism'**

https://insideepa.com/daily-news/rejecting-criticism-epa-touts-cwa-401-rule%E2%80%99s-%E2%80%98cooperative-federalism%E2%80%99

By Lara Beaven

June 1, 2020

EPA is defending its final Clean Water Act (CWA) rule limiting the scope of state reviews of federally permitted projects' water quality impacts as defining the appropriate parameters of the agency's "cooperative federalism" policy balancing EPA and states' regulatory powers, rejecting calls from critics that the rule undercuts states' authority.

"[T]he final rule does not infringe upon the roles of States as co-regulators, nor does it undermine cooperative federalism," EPA says in the rule, signed June 1 by EPA Administrator Andrew Wheeler ahead of its upcoming publication in the *Federal Register*.

Wheeler told reporters June 1 that while many states conduct their CWA section 401 permit certifications in accordance with the water law, some states do not and have been "trapping projects in a bureaucratic Groundhog Day" to prevent them from moving forward by raising concerns about climate change and other non-water quality issues.

The new rule supports a state's right to ensure its water quality standards are protected but it does not allow one state to dictate to others what they should do, Wheeler said.

While the rule is drawing praise from GOP lawmakers and others who have said the prior 401 permit process stymied major pipeline and other fossil fuel projects, it is likely to draw a lawsuit from environmentalists and Democratic-led states. "This rule defies Congressional intent and flies in the face of cooperative federalism--a concept, we're reminded, that's merely a pretense in this administration." Sen. Tom Carper (D-DE), the top Democrat on the Senate environment committee, said in a statement.

His comments echo concerns raised by a number of commenters, who asserted that the earlier proposed version of the rule was inconsistent with the concept of cooperative federalism and the important role of states as co-regulators. As a result, these commenters believed that the proposed rule undermines the cooperative federalism structure established by Congress in the CWA in section 101(b) and section 101(g), EPA says.

Most of these commenters noted that the CWA recognizes states' primary authority over their water resources, designates states as co-regulators under a system of cooperative federalism, and expresses intent to preserve and protect states' responsibilities and rights, the rule says.

The commenters stated that EPA should not dictate what states can and cannot do, with another commenter asserting that the proposed rule would unduly limit states' authority and autonomy to protect their water resources. A few commenters asserted that the proposed rule would harm Congress' division of authority between certifying authorities and federal licensing and permitting agencies.

But EPA says the final rule "does not and cannot alter the basic scope of authority granted by Congress to States and Tribes for the review of potential discharges associated with federal licenses and permits for compliance with water quality standards."

"Accordingly, this rule neither diminishes nor undermines cooperative federalism. Rather, the final rule clearly identifies when a certification is required and the permissible scope of such a certification -- including conditions of that certification -- and reaffirms that certifying authorities have a reasonable period of time to act on a certification request, which cannot exceed one year. This clarity helps define the appropriate parameters of cooperative federalism contemplated by section 401, and does not undermine it," the final rule says.

**Early Reaction**

Some Republican-led states are praising the final rule, saying the regulation will streamline the permitting process for essential energy infrastructure and close loopholes in the CWA section 401 certification process to prevent some states from inappropriately extending their jurisdiction beyond their own boundaries.

But the final rule is largely unchanged from the proposed version and is unlikely to satisfy concerns raised by numerous state regulators and Democratic attorneys general.

For example, the Association of Clean Water Administrators was highly critical of the proposed rule, arguing it would diminish state authority, unlawfully reduce the scope of CWA section 401 reviews, create a role Congress never intended for federal agencies and present implementation challenges for states.

Under section 401, states are generally authorized to review any proposed activity that requires a federal license or permit and may result in a discharge to ensure compliance with appropriate state water quality requirements. These actions include CWA section 402 discharge permits in states where EPA administers the permitting program, CWA section 404 permits issued by the Army Corps of Engineers, hydropower and pipeline licenses issued by the Federal Energy Regulatory Commission (FERC), and Rivers and Harbors Act sections 9 and 10 permits issued by the Corps.

The final rule, like the proposal, stipulates that states have no more than one year to act on a request for 401 certification and that certifications can only apply to activities that may result in a discharge from a point source into a water of the United States.

However, EPA says it amended provisions in the final rule to increase clarity and regulatory certainty, including clarifying the definition of "water quality requirements," adding elements required in a party's request for certification, and refining the information that must be included in a decision document.

Additionally, the final rule requires a party that will need a 401 certification to request a pre-filing meeting with state officials in order to promote early coordination. An EPA official told reporters that states are not required to grant the request for a pre-filing meeting, but the agency believes "this is a really great tool" to ensure states can meet the one-year deadline for a decision.

Furthermore, the final rule clarifies that federal agency review of a state's 401 decision document is focused on procedural requirements of section 401 and the final rule, rather than substantive issues in the document, as the proposed rule would have allowed.

The final rule explains that as a general matter, federal agencies may not readily possess the expertise or detailed knowledge concerning water quality and state law matters that would be necessary to make substantive determinations.

"EPA has determined that other provisions of this final rule, such as the definitions of 'water quality requirements,' 'discharge,' and 'certification,' and the information requirements for certification conditions and denials listed in section 121.7(d) and section 121.7(e) [of the rule], will help ensure that certifying authorities have the information and necessary tools to act on a certification request within the scope of certification as provided in this rule."

EPA officials said if parties have concerns about the substantive issues in the decision document, those will be left for the courts to decide.

The rule says this limited review function may be new to some federal agencies but is consistent with EPA's own longstanding practice under its National Pollutant Discharge Elimination System regulations implementing section 401.

"Under the final rule, if a certification, condition or denial meets the procedural requirements of section 401 and this final rule, the federal agency must implement the certifying authority's action, irrespective of whether the federal agency may disagree with aspects of the certifying authority's substantive determination."

**EPA's Defenses**

But the final rule defends other provisions left unchanged from the proposed rule despite state opposition.

For example, some commenters raised concerns that the proposed rule would be inconsistent with existing state requirements, such as state statutes or regulations regarding notice and comment, completeness, impact and degradation avoidance, and mitigation that may require more information and time for the certification process than the rule provides.

The final rule says one commenter asserted that if states were not provided additional time to assess the new rule's impact on their state laws and regulations, the new rule could require the states to either violate their own laws or deny more section 401 certifications, which could result in litigation and further delay for projects subject to section 401.

Other commenters asserted the proposed rule would make state 401 programs less efficient and would lead to national inconsistency, and several commenters asserted that EPA's interpretation of the CWA and case law will result in legal challenges to the final rule, which would in in turn lead to confusion and delays in its implementation.

Additionally, several commenters indicated that because states may need to change their statutes and regulations in response to the final rule, litigation will ensue over those state changes resulting in further regulatory uncertainty, defeating the intent of the proposal to make the section 401 process more efficient.

EPA acknowledges that some states may need to update their regulations to be consistent with the procedural and substantive elements of the final rule, and while such updates may have an initial burden on states, they will ultimately result in more efficient certification and federal permitting processes.

Typically, this type of CWA rule would become effective 30 days after publication in the *Federal Register*, but EPA says it is making the rule effective 60 days after publication in order to give the agency additional time to develop implementation materials for states and federal agencies.

Additionally, EPA says most if not all states have emergency rulemaking authorities and the agency remains reading and willing to provide any necessary technical assistance.

**States lose some Clean Water Act authority under new EPA rule**

https://phys.org/news/2020-06-states-authority-epa.html

by Elvina Nawaguna

States have less say in issuing Clean Water Act permits under an EPA rule finalized Monday as the Trump administration and conservative lawmakers seek to speed energy projects.

The rule limits the scope of environmental reviews that states conduct before issuing permits for projects such as pipelines and hydropower plants. It directs states to narrow their reviews to water quality issues and creates a one-year deadline for states to make decisions.

The EPA proposed the rule in August following directions from President Donald Trump's "Promoting Energy Infrastructure and Economic Growth" executive order. It appears to target blue states that have repeatedly rejected energy projects such as pipelines.

EPA Administrator Andrew Wheeler, who singled out New York Gov. Andrew M. Cuomo's recent vetoing of a planned natural gas pipeline, said many states use their Clean Water Act authority to "inappropriately" trap infrastructure projects "in a bureaucratic groundhog day" hoping that investors would get frustrated and abandon the ventures.

"Today's action will end this abuse of the Clean Water Act," Wheeler told reporters.

Under the new rule, if a state misses the one-year deadline to issue a permit, the requirements for certification under the Clean Water Act would be waived.

Before issuing permits for projects such as pipelines, dams and other energy proposals, states typically consider a wider range of impacts beyond the concentration of pollutants in water. They sometimes also take into consideration water levels, potential damage to aquatic life from dredge and fill activities, downstream impacts and climate change.

Several conservative lawmakers and industry groups have sought an easier permitting process, decrying a protracted evaluation system that they say hampers development.

Senate Environment and Public Works Chairman John Barrasso, R-Wyo., said the rule would curb abuse from states like Washington, which he argued has "hijacked" the permitting process and blocked Wyoming coal from being exported.

"It's an important step in the right direction to help Wyoming coal and other energy markets," he said.

Barrasso and other Republican senators including Montana's Steve Daines, Shelley Moore Capito of West Virginia and North Dakota's Kevin Cramer in November introduced legislation that would codify that rule's prescriptions.

"Just as we expect the federal government to stay within the confines of the law, states must do the same," Cramer said in a news release, adding that Washington and New York have used the Clean Water Act "as an excuse to disrupt interstate commerce and weaken energy producing states to try to score cheap political points."

The National Mining Association also joined the chorus of groups lauding the administration for moving to ease the permitting process.

"Decisions on 401 applications have dragged out for years, putting projects in jeopardy and exacerbating the already woefully inefficient permitting process hampering so many U.S. mining projects," said Rich Nolan, the mining association's president and CEO. "This new clarity on the timeframes for certification, the scope of certification review and other procedures, is an important step in promoting smart investment in our country's natural resources and infrastructure projects."

Critics say the EPA is overstepping states' rights to protect their water bodies and safeguard public health.

"It's all about really ramming through energy projects, such as hydropower and oil and gas pipelines against the wishes of the state boundaries," said Betsy Southerland, who held different roles at the EPA for three decades, including as director of science and technology in the Office of Water, before retiring in 2017.

Opponents of the rule also say it contradicts the GOP's frequent touting of its support for states' rights.

"This rule is an egregious assault on states' longstanding authority to safeguard the quality of their own waters," Lisa Feldt, Chesapeake Bay Foundation's vice president for environmental protection and restoration, said. "Despite the Trump administration's professed respect for 'cooperative federalism,' it is clearly willing to steamroll states' rights and greenlight major construction projects with no regard for how they might damage state waters."

Southerland, who is a member of the Environmental Protection Network, an organization of former EPA employees, drew parallels between the new rule and the administration's move to rescind the authority of California—the nation's largest automobile market—to set its own vehicle emissions standards under the Clean Air Act.

She said the new Clean Water Act rule would have a "much bigger" impact than the removal of the California waiver authority because it affects every state.

"So this, I think, will get litigated by states," she said. "It will severely limit all aspects of the states' ability to maintain healthy and abundant fisheries, drinking water supplies and certainly impact their ability to have safe flood control."

**EPA moves against states' pipeline blockade**

https://www.expressnews.com/business/energy/article/EPA-moves-against-states-pipeline-blockade-15310530.php

By James Osborne

WASHINGTON — The Environmental Protection Agency is moving ahead on a regulatory shift designed to limit the ability of states to block natural gas pipeline projects in the name of climate change.

Sparked by New York Gov. Andrew Cuomo's decision to block a series of pipeline projects runnning through his state, the final rule issued Monday would allow states to halt projects for matters of water contaminati0n, not wider environmental concerns, and force them to make their decisions within a year.

The move drew applause from oil and gas proponents, which have long pushed to limit the ability of states to block infrastructure projects.

"For far too long, environmental activists and Green New Deal enthusiasts have sought to abuse the Clean Water Act to indefinitely delay infrastructure projects and limit critical interstate commerce," Sen. Ted Cruz, R-Texas, said in a statement.

Last year President Donald Trump ordered the EPA to take steps to limit the ability of governors to slow construction of infrastructure projects, drawing widespread opposition from environmental groups.

"The Trump administration's rule guts states' and tribes' authority to safeguard their waters, allowing it to ram through pipelines and other projects that can decimate vital water resources," said Jon Devine, director of federal water policy at the Natural Resources Defense Council. "This is a dangerous mistake. It makes a mockery of this EPA's claimed respect for 'cooperative federalism.'"

**EPA clarifies Clean Water Act's Section 401 to accelerate energy infrastructure projects**

https://pennbizreport.com/news/16600-epa-clarifies-clean-water-acts-section-401-to-accelerate-energy-infrastructure-projects/

By Hil Anderson

The Trump administration has announced a final rule that clarifies a key section of the U.S. Clean Water Act (CWA) that should now speed up the approval of energy infrastructure projects.

The Environmental Protection Agency (EPA) said June 1 that the new final rule on Section 401 of the CWA, which became law in 1972, requires states and Native American tribes to rule on permit requests within one year of being submitted, and that decisions should be based solely on the project's effect on water quality.

"EPA is returning the Clean Water Act certification process under Section 401 to its original purpose, which is to review potential impacts that discharges from federally permitted projects may have on water resources, not to indefinitely delay or block critically important infrastructure," said EPA Administrator Andrew Wheeler.

The EPA launched its review of the Section 401 process under an executive order issued by the Trump administration in April 2019 directing federal agencies to seek out ways to speed up approval of energy infrastructure projects that supporters say are often bogged down by seemingly endless red tape. "Today, we are following through on President Trump's Executive Order to curb abuses of the Clean Water Act that have held our nation's energy infrastructure projects hostage, and to put in place clear guidelines that finally give these projects a path forward," Wheeler said.

Section 401 certifications are issued by a state or a Native American tribal government based on the individual project's potential to discharge pollutants into waters within their borders.

The State of New York last month denied Section 401 certification for the proposed Northeast Supply Enhancement pipeline, which would ship natural gas from Pennsylvania to New York City. The state said the dredging for the project would likely churn up sediment laced with chemicals, heavy metals and other toxins that would degrade water quality in New York Bay. The state ruling, however, also declared that shipping more gas into New York could jeopardize plans to reduce the amount of fossil fuels used in the state. The EPA said the new Section 401 rule means that states go beyond the scope of the CWA when they consider "issues other than the impact on water quality."

The American Petroleum Institute (API) said in a statement that the clarifications would make it less likely that pipelines and similar projects could be blindsided by Section 401 decisions based on factors other than water pollution. "We support the Clean Water Act, and though certain states have continued to go well beyond its scope for water quality certifications, we hope the addition of a well-defined timeline and review process will provide certainty to operators as they develop infrastructure projects that meet state water quality standards," said API vice president for Midstream and Industry Operations Robin Rorick.

There were also cheers on Capitol Hill by lawmakers from energy-producing states, including U.S. Sen. Shelley Moore Capito (R-WV) whose state, along with Pennsylvania, could ship additional gas supplies into New England if pipeline capacity were to be expanded. "The policy announced today means West Virginia producers could finally have a fair shot at selling affordable natural gas to consumers in New England and elsewhere around the country," Capito said in a written statement. "The result of states, like New York blocking new pipeline construction, is that our fellow Americans must pay more for dirtier foreign energy, such as polluting fuel oil, often from hostile regimes like Russia."

The coal industry also stands to benefit from the EPA rule by expanding access to seaports for export purposes. U.S. Sen. John Barrasso (R-WY), chairman of the Senate Environment and Public Works Committee, said in a statement: "The Trump administration's rule will allow important energy infrastructure projects to get done faster. It's an important step in the right direction to help Wyoming coal and other energy markets."

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